QUALIFIED MARTIAL LAW, A LEGISLATIVE PROPOSAL.[20a]

PART II.

IN considering the powers and liabilities of the military in dealing with the citizen, the question of what a subordinate is to do when confronted by a conflict between the law and military orders is a difficult and interesting one. Sections 15 and 16 of the Code (the draft of which is submitted herewith), deal with *illegal orders*. The general rule is that persons engaged in the military service of the state or nation can find no justification in the illegal orders of a superior officer if such orders are so manifestly illegal that a man of ordinary sense could not reasonably suppose that the officer had legal authority or ground for giving them.[21]

Military men believe that the military law of strict obedience to orders is a rule that, for all practical purposes, admits no exception, as being essential to discipline.[22] In this, as in some other respects, we cannot yield to the extreme demands of military authority and have at the same time due regard for the rights of the citizen.

The provisions of the Code are drawn in part from the United States Army Regulations, and aim to give as much protection as possible to the subordinate, while still preserving the supremacy of the law, and cautioning the subordinate against blind obedience to cruel or wanton commands, which is often made a cover for going beyond them.

Secs. 17, 18, 19, and 20 deal with the difficult and important subject of *arrest*. At common law a peace officer is authorized to make an arrest without warrant, on a charge of felony, in the following cases only:

1. If the felony is being committed or has in fact been committed by the person arrested.

2. If the felony has in fact been committed by some one, and the person arrested is reasonably suspected by the officer to be the doer of it. (This is the rule for private persons also).

3. The special privilege of officers at common law is where a felony is reasonably suspected by the officer to have been committed by some one, and the prisoner taken is reasonably suspected by the

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[20a] (Continued from the December number.)

[21] Franks v. Smith, 143 Ky. 232, 134 S. W. 484, Ann. Cas. 1912D. 319, L. R. A. 1915A. 1141, 1145, 1173, note; Mitchell v. Harmony, 13 Howard 115.

[22] McCall v. McDowell, Fed. Cas. 8673.

officer to be the doer of it. In this respect only does the common law of arrest recognize any difference between the private citizen and the peace officers whose duty it is to keep the peace. If an arrest is made without these elements of authority, then the person arrested may sue for false imprisonment.[23]

On a charge of misdemeanor, a peace officer may, at common law, arrest without warrant on the following conditions only:

1. If a misdemeanor involving a breach of the peace has in fact been committed by the person arrested and the officer is present at the act or its impending renewal; and

2. If the arrest is made immediately or in fresh pursuit.

The common law did not authorize the arrest without warrant of persons merely suspected of misdemeanors. In cases of actual breach of the peace, the arrest without warrant was authorized not so much for the purpose of bringing offenders to punishment as in order to preserve the peace, and the right of arrest was accordingly limited to cases in which the person to be arrested was taken in the act, or immediately after its commission.[24]

State statutes, as a rule, do not go much further than the common law, but the power of arrest is still carefully limited to prevent arbitrary interference with the liberty of innocent persons on minor charges.[25]

Sec. 17 extends a special privilege of arrest without warrant to the military, on reasonable suspicion of the commission of any criminal offense, and of the person arrested being the doer, whether the offense be a felony or a misdemeanor. It also gives power to arrest any one who, by threats or overt acts, gives apprehension that he is about to commit a breach of the peace. This provision obviates the necessity of deciding whether an offense is a felony or misdemeanor. The line of distinction between felony and misdemeanor is largely historical, and in many instances the law regards as misdemeanors offenses of greater moral turpitude than many felonies.[26] The officer is not excused, at common law, if he erroneously supposed that certain acts constituted a felony when only a misdemeanor. The force which an officer may use to prevent the escape of one arrested for a *misdemeanor* is no greater than that which may be used to effect the arrest. The officer cannot, in either case, take the life of the accused or inflict great bodily harm, except to save his life or

[23] 1 Stephen, History of Criminal Law, ch. 7, 165; 2, Wigmore, Cases on Torts, 903; Snead v. Bonnoil, 166 N. Y. 325.

[24] 1 Stephen, History of Criminal Law, 165, 193.

[25] Lynn v. People, 170 Ill. 527, 48 N. E. 964.

[26] Commonwealth v. Carey, 12 Cush. 246 (1853).

prevent like harm to himself. The use of a pistol by an officer in attempting to arrest a person charged with a misdemeanor is excessive force which will render him liable for the consequences, but to effect an arrest in a proper case for felony the officer may shoot if the shooting appears reasonably necessary to overcome resistance or prevent escape. A peace officer, however, has no right, merely upon suspicion that a felony has been committed, to shoot the person suspected to prevent his escape if, in fact, the felony has not been committed.[27]

When a delinquent or suspect is arrested, he ought to be brought as soon as possible before a Justice of the Peace, police judge, or committing magistrate, since he can be lawfully held in custody pending his trial only after a judicial determination of his probable guilt. There can be no imprisonment without preliminary inquiry as to whether or not there be reasonable ground for detention, pending trial. It is a recognized principle that commitment being only for safe custody, whenever bail will answer the same purpose it ought to be taken. Magistrates have, however, large discretion as to what will be sufficient bail, and a person arrested may be committed to custody for want of bail, or for failing to furnish proper security to keep the peace. (See Sec. 19 of the Code). It is not the function of the military to supersede the courts in these matters because they do not like or trust them.

It has been held, however, by the Supreme Court of Colorado, in the celebrated *Moyer* case[28] that, entirely independent of the authority of the governor to declare martial law, or to suspend the writ of habeas corpus, any person may be arrested by the military authorities on suspicion of participating in, or aiding and abetting an insurrection; he may be imprisoned without hearing or bail, and the legality of the arrest and detention cannot be inquired into or reviewed by the courts. It is argued that if offenders or suspects must be handed over to the civil courts they might be released on bail, and left free to rejoin the rioters. Further, the military might be subjected to actions of replevin by those whom they had deprived of their arms, and might be required to return them to those who would thus be equipped to continue their lawless conduct. It is further held that the courts cannot review the facts upon which the governor acted, in arresting suspects, as this would be a direct interference with his authority. The court argues that, since the military may resort to the extreme measure of taking life in order to suppress in-

[27] State v. Cunningham, (Miss.) 51 L. R. A. (N. S.) 1179 and note.
[28] In re Moyer, 35 Colo. 159, 12 L. R. A. (N. S.) 979, 117 Am. St. Rep. 189.

surrection, the milder means of seizing and imprisoning the persons participating in riot must *a fortiori* be justifiable.

This decision had, up to that time, no precedent, and under it orders of the military officers became the law. This power of arrest was extensively resorted to during the recent coal strike in Colorado, and the strikers saw their leaders and their fellows arrested and cast into jail without any civil charge of crime and without any opportunity for hearing before a civil court, on any pretext which seemed sufficient to the military.

The arrested person held by the military may not be guilty of any crime and may not have rendered himself or herself in any way amenable to the laws of the state, but if, in the opinion of the military authorities, he is a suspected or dangerous character, an agitator, whose presence is deemed "prejudicial to public order" or "incompatible with public tranquility" he may be arrested without warrant, may be for weeks and months imprisoned, and may then be removed by force to any other place. He may or may not be informed of the reason for this summary proceeding. But in either case, he is perfectly helpless. He can not examine witnesses. He cannot summon his friends. He has no right to demand a trial or even a hearing. He cannot sue out a writ of habeas corpus, or if he does, it is denied, as of course. His communications with the world are so suddenly severed that even his own relatives may not know what has happened to him. He is literally and absolutely without any remedy or means of self-defense.

This doctrine leads to absolute martial law and farther still. Since the Governor is at all times bound to take care that the peace be preserved and that the laws be faithfully executed, it would logically follow that he has at all times an executive discretion as to the measures to be taken with which neither legislature nor courts could interfere, and it would not matter whether the military had been called out or not.

But the power of the Governor is to execute the laws, not to subvert them, and his acts and the acts of his subordinates must conform to the law as declared by the courts. The Governor and the soldier as well as every other citizen are subject to the law of the land. That an act was done by military order or by order of the Governor is no defense, unless the order itself be one conformable to law.

As Lord Chancellor THURLOW said in the great debate on the Lord Gordon riots, "The king, any more than a private person, could not supersede the law, and, therefore, he was bound to take

care that the means be used, even in rebellion and insurrection, be legal and constitutional; and the military employed for that purpose are amenable to law, because no command of their particular officer, no direction from War Office or order in council could sanction their acting illegally."[29]

Yet the Colorado court decides that persons so arrested by the military on suspicion only may be restrained of their liberty, at discretion, without warrant or charge or hearing, until such time as the governor declares the insurrection to be at an end and order to be restored.

As BLACKSTONE says, "The glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful. This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court upon a habeas corpus may examine into its validity, and according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner."[30] If the grounds of the imprisonment of persons arrested without warrant cannot be inquired into by the courts, and if the governor is the sole judge of the necessity to imprison and detain suspects, then the writ of habeas corpus is certainly evaded, if not suspended, for all practical purposes.[31] The suspension of the privilege of the writ does not go so far as this. That enables persons to be arrested on suspicion and detained without bail or speedy trial by paralyzing one remedy. This Colorado doctrine kills the right itself by authorizing arbitrary imprisonment and by substituting executive orders and the vague plea of "military necessity" for grounds and causes defined by law.[32]

The Montana court, while it professes to follow this Colorado doctrine, shows a disposition to limit it, and to inquire, from time to time, into the necessity of the detention. It would seem that military prisoners should be turned over to the civil authorities for preliminary examination and trial, as soon as that can be safely done, to-wit, when danger of rescue is over.

The effects of the use of an arbitrary power of imprisonment may be very serious. Mr. Eugene V. DEBS has testified in regard to the Chicago strike of 1895 that as soon as the employees found that

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[29] See also W. M. Ivins, 18 Albany Law Journal, 85, 107.

[30] 3 Bl. Comm. *129, 133, 1, ib. *135.

[31] See In re Boyle, 6 Idaho 609, 45 L. R. A. 832, note. Cf. Johnson v. Jones, 44 Ill. 156, 92 Am. Dec. 159.

[32] See Skeen v. Monkhimer, 21 Ind. 1; Jones v. Seward, 40 Barb. (N. Y.) 563; Ex parte Moore, 64 N. C. 802, 807.

their leaders were arrested and taken from the scene of action they became demoralized, and that ended the strike. These arrests were made, however, under authority of the United States courts.[33]

In the Coeur d'Alene labor trouble of 1899, martial law had been declared in Shoshone County, and General MERRIAM was sent by the President with federal troops to the aid of the state. Over seven hundred men were arrested and held in military custody, at the instance of the state authorities, by the federal troops. On May 11, 1899, Gen. MERRIAM telegraphed Governor STEUNENBERG that he was still holding five hundred prisoners in a barn and box cars. "All are very uncomfortable, and with unsanitary conditions which will soon become intolerable. * * * It is impracticable to make this large number of prisoners reasonably comfortable here without considerable time and expense."

During the progress of making these wholesale arrests of those suspected of complicity in the rioting, a notice was served by the Governor's representative upon all mine owners of the district, by which, during the continuance of martial law, they were forbidden to employ miners unless they were able to present permits from the state authorities. The Governor's representative presented to Gen. MERRIAM a draft of his proclamation to that end, and requested Gen. MERRIAM to join in it. Gen. MERRIAM authorized his name to be printed at the bottom of the poster, under the words "Examined and approved," on certain conditions.[34]

VI.

THE CODE. CHAP. II. RESTRAINTS ON MILITARY POWERS.

Chapter II. of the Code deals with the *liability and limitations on the powers of the military*. For the most part, it is believed to be only declaratory of the common law and of the constitutional guaranties which are always supreme. But, in view of the West Virginia cases, and the deep-seated opinions of military men and others to the contrary, it seems well to emphasize these matters by statutory declaration. Many intelligent persons apparently cannot rid themselves of the misconception that there is, in some department of every government, power to declare martial law. This delusion has been encouraged by loose language in some cases, particularly in

[33] See U. S. v. Debs, 64 Fed. 724, 759.

[34] Federal Aid in Domestic Disturbances, (1903) p. 248-253.

Luther v. *Borden*.[35] It is important to understand that no such thing as absolute martial law can exist at English law or under American constitutions, and particularly that it cannot exist under state authority.

Many military men fail or make matters worse in domestic disturbances because they do not understand their "mission." This is not to make war or break the strike but to restore the peace and the power of law enforcement to the civil authorities, the courts and the local peace officers.

Military authorities too often treat the civil authorities with arrogance and contempt, when they should rather bear in mind the structions given by President WASHINGTON for the government of the troops, dated at Bedford, October 20, 1794. "You are to exert yourselves by all possible means to preserve discipline amongst the troops, particularly a scrupulous regard to the rights of person and property, and a respect for the authority of the civil magistrates, taking care to inculcate and cause to be observed this principle, that the duties of the army are confined to attacking and subduing of armed opponents of the laws, and to the supporting and aiding of the civil officers in the execution of their functions."

As was pointed out by Attorney General Caleb CUSHING,[36] "The extreme vagueness of existing conceptions on this subject of martial law is a matter of regret, and the removal of this *a desideratum* in our constitutional jurisprudence. * * * Our law books, whether civil or military, do not afford any correct or useful information on the subject."[37] Mr. CUSHING, in the opinion referred to, came to the conclusion that the power to suspend the laws and to substitute military in the place of civil authority is not a power within the attributes of the governor of one of the territories of the United States. He points out that in the case of military occupation of enemy territory, even when this is within our own country, the President, under the war power, has an absolutely free hand. But, as he points out, "This is incidental to the state of solemn war and appertains to the law of nations. The commander of an invading, occupying, or conquering army rules the invaded country with supreme power, limited only by international law and the orders of the sovereign, or the government he serves or represents. * * * This does not enlighten us as to martial law in one's own country, and as administered by

[35] 7 Howard, 1.

[36] 8 Op. Atty. Genl. 365.

[37] One example of the dangerously misleading books on military law is that of Mr. B. L. Bargar, on the Law of Riot Duty.

its own military commanders. This is a case which the law of nations does not reach."

The reason for the supremacy of the law of war over the municipal law in the enemy's country is, in the first place, that the troops are endeavoring to overthrow the local government, and immunity from ordinary liability is essential for the protection of officers and soldiers of the army when in service in the field in an enemy's country; and secondly, that it would be contrary to reason to suppose that the tribunals of an enemy would be able to administer anything worthy the name of justice to a member of the invading army.[38] Accordingly, it was held by Attorney General KNOX that Capt. C. N. BROWNELL, a former officer, could not be legally prosecuted for having tortured a parish priest to death in the Philippines in order to extort information from him.[39]

There is, in most Continental countries, a status intermediate between war and peace, known as a *"state of siege,"* which may be declared for a fixed period for a district or city by reason of domestic insurrection or the approach of an enemy. It requires legislative enactment. This has been declared throughout France during the present war. Monsieur M. Paul MEUNIER brought in a bill, during March, 1915, before the French Parliament, to put an end to the state of siege outside of the "zone of the armies," an area somewhat larger than the actual area of military operations. He inquired what justified the maintenance of martial law outside the defined zone where it was necessary for purely military reasons. He accused the government of abusing the powers given it by the state of siege, by making arbitrary arrests, suppressing or suspending newspapers, censoring articles and news that had nothing to do with military operations, and generally preventing the expression of opinion. He inquired why it should be necessary that civilians should be tried by court-martial instead of by the ordinary courts. He argued that if there is any danger of explosion, it is caused by the suppression of opinion. When people are not allowed to talk, they begin to brood and become dangerous. If there is any discontent, it would be wiser to allow it free expression rather than to force it to smolder under the surface; sooner or later it will break out in spite of martial law and the press censorship.

In America, (as in England, until the recent Defense of the Realm Acts) we are without any authority for the declaration of a state

[38] See Dow v. Johnson, 100 U. S. 158.

[39] 24 Opinions, Attorney General, U. S. 570.

of siege.[40] How can it be claimed that the governor of a state may declare war or decide that war exists, and convert every citizen of a given district of the state into a public enemy or outlaw, and treat him accordingly with impunity? The existence of war in the legal sense is to be determined by the authorized political department of the government, the war-making power.[41] In this country this is found in the federal government, and properly only in Congress.

Very often the commanding officer of the state militia may be more or less of a politician, and his legal adviser, the judge advocate, may also be affiliated with some of the interests involved in the disturbance and subject to local prejudice. Therefore, to have the power of declaring martial law in the governor might mean simply putting these interests, whether on one side or the other, in absolute authority. If you are to have absolute martial law over citizens, it would be advisable to have in command of the forces a United States army officer of experience. He would usually be a man of education, clear-headed, cool, and of good judgment. This officer would be a man free from local prejudices or connections. He would be far more impartial, and better trained than the average general of a state guard, and would, therefore, make a better military dictator, if you are going to have one at all.

It would seem evident that to uphold the declaration of martial law solely as a war measure, as practically all the authorities do, excludes this power from the Governor or the legislature of a state. In the famous case of *Luther* v. *Borden*,[42] one of the main questions of the case was whether a statute purporting to establish martial law in Rhode Island in 1842 could be deemed constitutional. TANEY, C. J., held that it was not necessary to inquire to what extent nor under what circumstances the power to declare martial law may be exercised by a state in order to decide that particular case for the defendant. He did, however, speak of Dorr's Rebellion as being a state of war in which the state might resort to the rights and usages of war.

Mr. Justice WOODBERRY dissented as to the constitutionality of this statute. In one of the most able discussions of martial law to be found anywhere in the authorities, he clearly demonstrated, among other things, that the act of the legislature of Rhode Island could not be upheld as a war measure.

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[40] Dicey, Law of the Constit. (7th ed.) p. 283-289.

[41] 40 Cyc. 317.

The Constitution expressly provides that "The Congress shall have power to declare war." (Art. I, Sec. 8). To remove all doubt on the exclusiveness of the war power in Congress, in all cases, domestic or foreign, there is a prohibition on the states "that no state shall, without the consent of Congress, engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

BISHOP, in his CRIMINAL LAW,[43] expresses doubt whether a state which has no war-making power without the consent of Congress can declare martial law, which is an act of war, even in suppressing a rebellion at home.

We have already seen that martial law depends upon the question, whether there is war or not.[44] What then, is the test for determining whether a state of peace or war exists at a given time in a given place? The answer is that no unfailing test or definition is to be found, and that it would be intolerable to leave the determination of this question, and the suspension of the federal as well as of the state constitution, to the executive of a state.

In *Ex parte Milligan*[44a] it was held that the military court which, in 1864, tried Milligan for treason and sentenced him to death, was without jurisdiction; this for the reason that the court sought to exercise jurisdiction in the state of Indiana, which was not the theater of actual warfare; and as the courts of that state were open, they alone had jurisdiction. The Supreme Court laid it down that no doctrine involving more pernicious consequences was ever invented by the wit of man than that any of the provisions of the Constitution can be suspended during any of the great exigencies of government.

In the recent case of *Ex parte McDonald*[45] the Montana Supreme Court repudiated the claim by the military authorities that the civil courts are without jurisdiction to order the release of a prisoner held by the militia, after the declaration of martial law. The court further held that neither the Governor nor the military under him can lawfully punish for insurrection or for any other violation of the law. The courts cannot be ousted by the agencies detailed to aid them, nor can their functions be transferred to tribunals unknown to the Constitution. The attempt to try and punish offenders in Butte during the month of September, 1914, by military courts was,

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[42] 7 Howard 1.

[43] 8th ed., Sec. 49, Note 3.

[44] Tilonko v. Atty. Genl. [1907] A. C. 93; Ex parte Milligan, 4 Wall. 2, Cf. 1 Gour, Penal Law of India, p. 274.

[44a] 4 Wall. 2.

[45] 49 Mont. 545, 143 Pac. 947, L. R. A. 1915B. 988.

therefore, a solemn and pompous farce. It would be highly unbecoming that the executives of the law should also be the judges, and that they should fight with a man one day and condemn him to death and execute him the next.

"It is an unbending rule of law that the exercise of military power, where the rights of citizens are concerned, shall not be pushed beyond what the exigency requires."[46] It can never be *necessary* to punish a man by military force after he has been arrested and overcome.

Chapter II, Secs. 2, 3, 4, and 5 are intended to do away with certain opinions and doctrines which have been asserted to the effect that the military may supersede the jurisdiction of the regular courts, establish military commissions to inflict punishment on civilians, and make themselves independent of the law. If the executive refuses to obey a writ of habeas corpus or other orders of the courts, then civil authority becomes subordinate to military force. The West Virginia court has recently gone to the greatest extreme in this direction,[47] but Idaho and Colorado have announced somewhat similar doctrines. Montana, however, as we have seen, has recently repudiated such claims.[48]

The idea of the civil responsibility of the military was one of the most cherished principles of our British and American ancestors, and it is, in effect, declared by all our state constitutions that the military shall remain civilly and criminally subject to the laws of the land, and shall not have a separate law, except as they are themselves subject to the additional restraints of military discipline. Articles of War, Sec. 59, gives the preference to the jurisdiction of the ordinary criminal courts over the military, except in time of war.[49] The military power does not extend to the trial and punishment of persons not in the military service, even in time of war, except in enemy territory.[50]

Sec. 6 is designed to overcome the danger that an acquittal by court martial should be a bar to a prosecution in a criminal court. There are some offenses that are purely military, and others that are both military and criminal. In *Grafton* v. *U. S.*[51] it is suggested

[46] Raymond v. Thomas, 91 U. S. 712.

[47] In re Jones, 71 W. Va. 567, 77 S. E. 1029, 45 L. R. A. (N. S.) 1030.

[48] Ex parte McDonald, 49 Mont. 454, L. R. A. 1915B. 988.

[49] 6 Opinions, Atty. Genl. U. S. 415, 423, 513; 23 Opinions, Atty. Genl. U. S. 120.

[50] Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159; Smith v. Shaw, 12 Johns. (N. Y.) 267; Jones v. Seward, 40 Barb. (N. Y.) 563.

[51] 206 U. S. 348, 11 Ann. Cas. 640.

"that any possible conflict between civil and military courts can be obviated, either by withholding from courts-martial all authority to try officers or soldiers for crimes prescribed by the civil power, or by investing them with exclusive jurisdiction." It has seemed best to choose the former alternative, and provide that courts-martial should have no jurisdiction to try officers or soldiers for any offense which the law declares to be a crime.[52]

Lieutenant K. E. LINDERFELT of the Colorado Guard, on April 20, 1914, broke the stock of his rifle over the head of Louis TIKAS, a Greek striker who had been taken prisoner, because he claimed that TIKAS had insulted him. TIKAS and two other prisoners were later shot in the back by soldiers under Linderfelt's command. For striking TIKAS while his prisoner LINDERFELT was never disciplined. He was tried by court-martial and found guilty of assault, but, owing to "mitigating circumstances," he was held not guilty of the charge. The motive of this court-martial seems to have been to forestall prosecution in the ordinary courts. If courts-martial are to be held like that held by the Colorado Guard, it is evident that their proceedings should not be permitted to be "once in jeopardy" and a bar to a criminal prosecution.

Many intelligent military men believe that civilians caught looting should usually be shot in their tracks, as the time is one of great emergency. Chapter II, Sec. 7 is intended to restrain this rash military tendency to be too quick on the trigger and to be too ready to shoot persons who fail to heed instantly orders to halt, etc., as manifested in such cases as *Commonwealth* v. *Shortall*,[53] when there is no need for such extreme measures.

Sec. 8 is intended to condemn unlawful searches and seizures, such as occurred in Colorado. It has been urged that the Code should provide for search warrants of the blanket variety to cover a town or locality like tent colonies, or a cluster of dwellings, with a provision that the owner be present if possible at the search, in order to facilitate seizure of arms. The Colorado constitution, like the constitution of all the states except New York, declares that the people have a right to hold themselves, their houses and possessions, without unreasonable search and seizure; consequently, no warrant of search or seizure ought to be issued but upon probable cause supported by oath, and the warrant must describe the thing or person to be seized.[53a] General warrants whereby an officer may be com-

[52] See Note in 31 L. R. A. (N. S.) 710.
[53] 206 Pa. St. 165, 65 L. R. A. 193.
[53a] Stimson, Federal and State Constitutions, Sec. 71.

manded to search any suspected places for persons or property, without describing the specific person or specific place, are illegal; much more so are searches and seizures under military orders, without warrant.[54] The military authorities of Colorado entirely disregarded this constitutional provision. In case of a violent quarrel in a house, or other breach of the peace, a peace officer may break open doors to preserve the peace, without warrant.[55]

Secs. 9 and 10 are intended to condemn practices which have been resorted to in West Virginia, Colorado, and elsewhere.

Secs. 12 and 13 are somewhat similar in effect to Articles of War, Secs. 54 and 55.

Constitutional rights may be regulated within proper bounds. It seems that the military should have power to define certain areas where citizens cannot go at certain times. For instance, such orders should be legalized as those given at Ludlow, that no strikers or their sympathizers, or operators or their sympathizers could be at the station at Ludlow at train time, unless they had tickets. Otherwise, the officer in command says, if he had allowed them to get together he would have had a "Donnybrook Fair" on his hands. Reasonable limitations on the holding of public assemblages and parades at certain times, in the interest of the preservation of the public peace, would also seem to be justified under the police power.

Judge L. A. EMERY[56] expresses the opinion that without violence to the constitutional guaranty of the right of the people to bear arms, the carrying of weapons by individuals may be restricted and regulated, and even prohibited, according as conditions and circumstances make it necessary for the protection of the people.

VII.

THE CODE. CHAP. III.

Chapter III deals with *the legal and judicial department.* Secs. 1 and 2 provide for the strengthening of the Judge Advocate's department. When the National Guard is called out, the Governor as a rule turns over almost entire control to his military representatives. They are largely guided by the advice of the Judge Advocate General, who may thus become the virtual commander-in-chief. It is desirable that the executive should have good legal advisers, available at all times, as to the steps which are authorized by law. Under

[54] Weeks v. U. S. 232 U. S. 383, 390, 58 L. Ed. 652.
[55] 1 Russell, Crimes, (7th ed.) 437.
[56] 28 Harvard Law Review, 493.

the Riot Act, the order to attack the mob was to be given by a magistrate, and it has been the English practice to have a civil magistrate or Justice of the Peace accompany the troops as their legal adviser.

Sec. 3 provides an administrative tribunal to inquire into alleged abuses by the military. It seems necessary, to protect the citizen, that soldiers who are guilty of abuses and misconduct be brought to a more speedy account than is possible by law-suits. The machinery here provided is purely administrative, disciplinary, and independent of any criminal proceedings. The idea is taken from the 54th Article of War, which, as Colonel WINTHROP points out, was evidently designed to protect civilians from disorderly and riotous acts on the part of the military, and to secure them indemnification for injuries suffered. He criticises the Article, however, as leaving in doubt the classes of injuries covered, and also as failing to indicate in what manner and by what instrumentality the reparation for such injuries is to be effected.[57] The section creates a special administrative tribunal, composed of military officers, and, if it is desired, also members of the judiciary of the state, to investigate complaints of abuses growing out of the disturbances. The findings of the Board of Inquiry are to be *prima facie* evidence only in civil suits. The idea of an official investigation which shall be *prima facie* evidence of facts found has proved one of the greatest reforms in the administration of justice in connection with industrial accidents. This is held not to be an interference with the constitutional prerogatives of the judiciary.

Secs. 6 and 7 are suggested by Articles of War 54 and 59.

VIII.

THE POSITION OF THE FEDERAL TROOPS UNDER STATE LAW.

We have postponed until the last a consideration of the law governing the federal troops when called forth by the President, on application of a state to protect it against domestic violence. Can the President of the United States proclaim martial law when the Governor of a state invokes federal aid? As pointed out by a publication entitled "Federal Aid in Domestic Disturbances,"[58] it is a recognized principle that the civil authority must be everywhere supreme; that the federal troops, like all other citizens, must always be subject and subordinate to law. In a pamphlet on "The Use of

[57] 2 Winthrop, Military Law, p. 1018.
[58] War. Dept. Doc. 209, (1903).

the Army in Aid of the Civil Power," by G. Norman LIEBER, Judge Advocate General of the United States Army,[58a] it is said, "When the military power is acting under the constitution in aid of the civil power and the opposition to the law is not of such a character that war exists, the civil power is still supreme, and the rule of war cannot be applied."[59] When opposition to the forces of the government of the United States amounts to war, there will be a justification for martial law in the field or locality of war; but when domestic violence does not amount to war, the state's invocation of federal aid to suppress it would not justify a resort to martial law. This seems to have been understood and observed during the riots of 1877.

Whether domestic violence does, in fact, amount to war or rebellion may, on occasion, be a very difficult question to decide. But it will not do to give the name "rebellion" or "war" to rioting or insurrection, however persistent or violent. Even the great railroad riots of 1877, extending throughout almost the entire country, and participated in by thousands, were, nevertheless, judicially determined not to be a rebellion or war.[59a]

But, it may be asked, how can a state military code in any way govern federal forces? The answer is that it does not purport to govern their internal discipline, but only their relations to the citizen. Although the duty is imposed on the United States by the federal Constitution to protect the state from domestic violence, and the army of the United States acts under the command of the President, yet the troops of the United States are subject to the laws of the state. If they were not subject to the state law, except so far as their federal authorization goes, they would be subject to no law. The purpose they serve is to aid the state in the execution of the laws and the restoration of the peace of the state. Just as the federal courts often enforce the laws of the state, so the federal troops, acting in aid of the state, enforce the state's peace and are subject to state law. The peace that is to be kept is the peace of the state, and every step to be taken in suppressing riots, tumult, and domestic violence by the federal troops falls within the province of the laws of the state rather than of the United States, and the soldiers are amenable to the state courts.[60]

It may be well to say a word in conclusion in regard to the Articles of War and the Army Regulations. The Articles of War are

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[58a] 1898, p. 47.

[59] The Prize Cases, 2 Black, 668. See also Annual Rep. of Atty. Genl. (1896) p. 77.

[59a] Co. of Allegheny v. Gibson, 90 Pa. St. 397.

[60] See 2 Winthrop, Military Law (2nd ed.) 1072, 1347, 1370; 6 Opinions, Atty. Genl. 415, 423, 513.

statutory provisions for the enforcement of internal discipline and the administration of military punishment in the army, enacted by Congress in the exercise of the constitutional power to make rules for the government and regulation of the land forces. They govern the military only and confer no rights and impose no liability upon other citizens.

The United States Army Regulations, promulgated by the President for the government of the army, deal with various matters of organization and military discipline. State militias are not subject to the Articles of War of the United States or the Army Regulations, unless such Articles and Regulations have been adopted or promulgated by the state.[61] Certain states have adopted them for the government of the respective Guards, at all times. Certain others have adopted them for the government of the militia only when in active service of the state. Some three or four states have enacted codes of discipline of their own. In some instances, the legislatures of states have adopted the Articles of War and the Army Regulations for the government of their respective National Guards, subject to such modifications as the Governor may make. The Articles of War being a Congressionally enacted penal code, it may be questioned how far it is proper to adopt them by statute as the law of the state, and then delegate to the executive authority to amend them. The misapprehension that the Articles of War are like the Army Regulations, nothing more than executive rules which may be amended from time to time by the executive, seems to exist in the minds of many.

It is evident that the adoption of the Articles of War and the Army Regulations will have no effect whatever in defining the legal relations of the military to the citizens.

In conclusion, it may be said that when the occasion has actually arisen for calling out the military, little opportunity is afforded to become advised of the legal principles governing their action. The proposed Code has been drafted after much study and labor, and after conferences with military lawyers. It is not supposed that it will be entirely satisfactory to our military experts, but the citizen has a voice in this matter also; and we must take account of military psychology and past and recent experience. It is believed that by its provisions the duties and the powers of the National Guard are properly defined, and that under this Code, if adopted and observed by the various states, the citizen will be protected in his rights, the community in its peace and safety, and the soldier in knowing the

[61] State v. Peake (N. D.) 40 L. R. A. (N. S.) 355.

true extent of his authority. If the law as to military authority is too strict and narrow for the needs of internal defense, it does not follow that the executive is to set aside all law in his discretion; but the abuses, shortcomings, and defects of our present system should be corrected and amended by statutes drafted with due consideration for the interests of all concerned. If the National Guard in enforcing the law is not willing itself to abide by law then some other form of state police or state constabulary should be provided.

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DRAFT OF A STATE MILITARY CODE FOR THE GOVERNMENT OF THE ORGANIZED MILITIA IN THEIR RELATIONS WITH CIVILIANS.

CHAPTER I.

POWERS AND DUTIES (Continued)

Sec. 15. All persons in the military service are required to obey strictly and to execute promptly the lawful orders of their superiors. A military subordinate cannot justify any act to the injury of person or property by military orders which are manifestly wanton, malicious, or unlawful.

Sec. 16. *Illegal Orders.* Any military order, whether given by the Governor of the state, or any officer of the National Guard, or a civil peace officer, that attempts or purports to invest either officer or soldier with authority in excess of that which may be lawfully exercised by a peace officer of the state, or a member of the military force under this act, after proclamation of a state of insurrection, is unlawful and void; but may excuse subordinates who are honestly and reasonably misled thereby.

Sec. 17. *Authority to Arrest without Warrant.* An officer may arrest, or order to be arrested without warrant, any one whom he finds committing any criminal offense; or whom he, on reasonable and probable grounds, believes to have committed a criminal offense, whether a felony or misdemeanor; or any one who, by threats or overt acts, gives reason to apprehend that he is about to engage in a riot or breach of the peace. The arrested person shall forthwith be taken before a justice of the peace or other magistrate to be dealt with according to law.

Sec. 18. *Preliminary Examination by Magistrate.* No person who has been apprehended by the military shall be detained after noon of the following day without being brought before a committing magistrate, unless such detention is necessary to prevent his rescue or escape. If, for any reason, there be no justice of the peace or magistrate available in the county or dis-

trict where the military arrest is made, or such officers are not performing their duties properly, the prisoner shall be at once removed to some other county or district for preliminary examination by a committing magistrate, where he may be held until trial is possible in the county where the alleged offense was committed, unless he consents to be tried elsewhere.

Sec. 19. *Security to Keep the Peace.* If there appears reasonable ground for apprehension that such person, if admitted to bail, will commit some offense against the public peace, he may be required to give ample security to keep the peace and be of good behavior, for any term not exceeding twelve (12) months, and if he refuses or neglects to do so, the justice may order him to be committed for any term not exceeding twelve (12) months, or until such security is furnished, or the disturbance or danger has ceased.

Sec. 20. *Report of Arrests.* Every officer under whose orders a civilian is arrested shall, within twenty-four (24) hours thereafter report in writing to the commanding officer the name of such prisoner, the offense charged against him, and the disposal of him. If he fails to make such report, he shall be punished as a court-martial may direct.

Sec. 21. *Surrender of Arms.* The Governor may, in time of disturbance, by proclamation published in two (2) newspapers, forbid the sale or transportation of fire-arms or ammunition or explosives in the entire state or any portion thereof, and may require all fire-arms and other weapons to be deposited with the military at certain places, and receipts given therefor. Any arms or other property used, or apparently intended for use, in aiding, abetting, or promoting a riot, insurrection, or other resistance to law, shall be surrendered, and it shall be the duty of the military to cause the same to be seized and detained pending the disturbance. Proper search warrants may be issued to discover concealed weapons.

Sec. 22. *Closing Saloons.* When tumult, or riot, or the apprehension thereof exist, the governor, mayor, sheriff, or military officer in charge may issue a proclamation requiring the keepers of saloons or places where intoxicating liquor is sold, to close such places and keep them closed until further orders, under penalty of Five Hundred (500) Dollars fine and confiscation of the liquor by the courts. The military may enforce such closing.

Sec. 23. *Impressing Property for Public Use.* Staff officers, captains, and those of higher rank shall have the power to requisition private property which may be imperatively needed for public defense or use, upon giving receipts therefor, the compensation to be thereafter paid by the state, by agreement or by judgment of a competent court, upon petition thereto.

Sec. 24. *Restrictions on General Public.* The military may not, unnecessarily, limit, restrict or interfere with the freedom of movement of peaceable citizens, but the right of public meeting, assemblage, or parade in streets and highways or elsewhere, may be subjected to reasonable limitations; and all persons may be prohibited from passing on certain streets or through certain lines of sentries in order to prevent riot or outbreak. Any person wilfully intruding into such lines shall be guilty of a misdemeanor and may be resisted with reasonable force and placed under arrest.

CHAPTER II.

LIABILITY AND LIMITATIONS ON THE POWERS OF THE MILITARY.

Sec. 1. *Law Remains Supreme.* A proclamation of martial law or of a state of war, insurrection or rebellion by the Governor of the state, or by any military officer thereof, shall have no effect upn the continuance of the constitutional guaranties of the state and federal constitutions, or upon the law and statutes, or upon the jurisdiction of the courts, or upon other civil authorities. The military must act in conformity with the constitution and statutes of the state, and within the ordinary powers of sheriffs and peace officers, except as those are extended by this act, upon the due proclamation by the Governor of a state of insurrection.

Sec. 2. *Military Orders and Proclamations Subject to Review.* No answer or return or order or proclamation of the Governor or any military officer shall be evidence, conclusive or otherwise, of the facts stated or recited therein, nor be taken as proving the necessity of their acts except the calling of the troops into service, and the invoking of their increased powers under this act.

Sec. 3. *No Power to Punish.* No military commission, court-martial, or other military court may be established to try civilians for crime or for disobedience of military orders. No punishment may be prescribed or inflicted upon civilians by military authority.

Sec. 4. *Must Obey Process.* The writ of habeas corpus or other process of the courts cannot be suspended, interfered with, or disregarded by the military. It is part of their duty to assist in enforcing the process and decrees of the civil courts.

Sec. 5. *Must Respond in Courts.* If the military take life or injure person or property by any act in excess of their lawful authority, they are subject to both civil suit and criminal prosecution in the ordinary courts, according to the principles of civil and criminal liability.

Sec. 6. *Criminal Jurisdiction Exclusive.* The ordinary courts shall have exclusive jurisdiction for the punishment of crimes, and in all cases where the same act constitutes an offense both under military and criminal law, courts-martial shall have no authority or jurisdiction to try officers or soldiers accused thereof, but the offender shall be turned over to the civil magistrate for trial.

Sec. 7. *No Power of Life and Death.* A guard, sentry, or other soldier cannot be authorized to shoot civilians caught looting, or in the commission of misdemeanors, or for disobedience of orders to halt or otherwise, where there is no apparent or reasonable necessity for the shooting to prevent murder, dynamiting, or other dangerous violence which can not be otherwise prevented, or to overcome resistance to or flight from lawful arrest.

Sec. 8. *Illegal Searches.* The military may not forcibly enter or search a private house in order to seize arms or other property concealed therein, without a search warrant; but they may break in, without process, for the suppression of felony or breach of the peace.

Sec. 9. *Illegal Imprisonment.* The military may not hold, detain, or imprison persons arrested by them any longer than is necessary to hand them over to the civil authorities to be dealt with according to law.

Sec. 10. *No Censorship.* The military have no authority to establish a censorship over the press or to interfere with the publication of newspapers, pamphlets, handbills, or the exercise of the right of free speech except under process of the courts. Persons may be arrested on the spot, without warrant, for incendiary speech or for inciting to crime and violence, but only when their language tends to provoke then and there some overt act of riot, violence, or disorder.

Sec. 11. *Partisans to be Excluded.* In time of strike, no private guards, detectives, or employes of the contending parties shall be enlisted or employed as members of the militia, and all persons found by the commanding officer to be actuated by animosity or personal ill-will towards either of the contending parties shall be forthwith released from active service.

Sec. 12. *Arrogance and Oppression Forbidden.* Officers shall prevent, by the most binding orders, any insulting, threatening, abusive, or overbearing conduct to civilians, or any unnecessary severity or harshness towards persons arrested, or any reckless use of deadly weapons. They shall inculcate a scrupulous regard for the rights of person and property and a respect for the authority of courts and civil magistrates.

Sec. 13. *Penalty for Insulting Officer or Soldier.* If any person shall molest, obstruct, resist, or insult, by abusive words or behavior, any officer or enlisted man while in the performance of his duty, he shall be guilty of a misdemeanor, and may be immediately arrested and kept under guard until he can be turned over to the sheriff or police to be dealt with according to law.

Sec. 14. *Pension.* If any officer or enlisted man of the National Guard of the state shall be wrongfully wounded, disabled, or killed while properly doing duty in active service, he or his widow, or parents, or children, while dependent, shall receive from the state a pension not exceeding $..... per month. All claims for pension under this section shall be made to the State Military Board, who shall thoroughly investigate all circumstances connected with the claim. The State Military Board shall revoke any pension granted when it shall appear that the pensioner is no longer dependent.

CHAPTER III.

LEGAL AND JUDICIAL DEPARTMENT.

Sec. 1. *Judge Advocate General's Department.* The Judge Advocate General's Department shall consist of the Judge Advocate General and five or more practicing lawyers or judges of the state who shall be appointed by the Governor as Judges-Advocate with suitable rank. The Judge Advocate General and the members of his department must be attorneys at law who have been admitted to practice before the highest courts of this or some other state for a period of at least ten years. They shall be carefully selected

for their professional knowledge, character, experience and fitness for the service. It shall be their duty to study carefully the legal aspects of military authority and the rights of the citizen with reference thereto, and to advise with the Governor and the military officers in command of the troops.

Sec. 2. *Legal Adviser To Accompany Troops.* Whenever the National Guard is called into active service, one or more members of the Judge Advocate General's Department shall be immediately ordered to report for duty to the commanding officer of the troops and to accompany the troops to the scene of the disturbance. One or more such advisers shall remain on duty at all times.

Sec. 3. *Administrative Inquiry Into.* If any member of the National Guard shall kill, wound, beat, or injure any person, or shall cause, direct, or order the killing, wounding, beating, or injuring of any person, or the wanton injury, destruction, or damage of any property, real or personal, it shall be the duty of the Governor, upon complaint in writing being made, as soon as possible thereafter to convene an impartial Board of Inquiry of three military officers, and in his discretion, also, including two members of the judiciary of the state, which shall investigate and report the facts to the Governor. If, on inquiry, the Board is satisfied that an injury has been inflicted by the wanton, malicious, cruel, or reckless abuse of power, it shall make orders for giving full reparation to the parties injured. The amount of damages for such injury to person or to property of a civilian shall be assessed by the Board, and reparation shall be made by the guilty officer or soldier to the persons injured, or to those dependent upon the party injured, if he is wrongfully killed. These proceedings shall be entirely independent of and in addition to any penalty or sentence for any criminal or military offense involved.

The Board shall have power to compel the attendance of witnesses, to receive their evidence and to investigate any accusation against any officer or enlisted man by any civilian, or by any officer or soldier against any civilian. The hearings shall be public, as in open court.

Sec. 4. *Enforcement of Reparation.* If any officer or soldier fails or refuses to make reparation, so far as he is able, to the party injured, when ordered to do so by the Board, he shall forthwith be dishonorably dismissed from the service. The findings or report of such Board shall be *prima facie* evidence of the facts found in any civil action for damages, either for or against any officer, or enlisted man. In case damages are recovered in any tort action, by a civilian against an officer, the state shall guarantee the payment of the judgment recovered for any wanton or malicious wrong or abuse of power committed by such officer while in active service and shall be subrogated thereto.

Sec. 5. *Joint Liability.* If proof is made that such an injury has been done by some persons of a command, but the active perpetrators cannot upon investigation be determined, all those present at the time may be held jointly liable and their pay may be applied in reparation of the damages inflicted.

Sec. 6. *Officer to Aid Redress.* Every officer shall, to the utmost of his

power, assist in redressing all disorders, abuses, or injuries to any person which may be committed by any officer or soldier under his command, and in the investigation thereof. If, upon complaint made to him, he refuses or omits to see justice done to the offender and reparation made to the party injured, so far as in his power, or to investigate alleged illegal acts by his subordinates, he shall be dismissed from the service, or otherwise punished, as a court-martial may direct.

Sec. 7. *Surrender of Accused Persons.* When any officer or soldier is accused of any offense which is punishable as a crime by the laws of the state or of the United States, the commanding officers are required, upon application duly made, and production of a warrant of arrest, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in arresting and bringing him to trial, unless the necessities of the service prevent such surrender and unless such removal would unduly hamper military operations; and in that event he shall be surrendered and delivered over as soon as possible thereafter without further application. If, upon such application, any officer wilfully neglects, except as aforesaid, to deliver over or surrender such accused person, or to aid in his arrest, he shall be dismissed from the service.